

Legal Issues Related to Sexual Orientation, Gender Identity, and Public Schools

Maria M. Lewis, Allison Fetter-Harrott, Jeffrey C. Sun, and Suzanne E. Eckes

In June of 2015, the U.S. Supreme Court ruled that the Constitution guarantees a right to same-sex marriage under both the Due Process Clause and the Equal Protection Clause of the Fourteenth Amendment.¹ This decision has undoubtedly had a positive effect on the lives of LGBT people. Moreover, in recent years, LGBT case law and legislation has evolved in ways that significantly impact the everyday experiences of students and employees in the K-12 context. However, uncertainties remain and the fight for full equality continues. Understanding the legal landscape is crucial to being an effective advocate for change. While this article does not cover the entire range of legal issues impacting LGBT students and school personnel, it examines specific legal issues recently addressed by courts, the U.S. Department of Education, and legislators—bullying and harassment, student speech, access for transgender students, and employment-related issues.

Bullying and Harassment

Although the Fourteenth Amendment to the Constitution guarantees equal protection under the law,² federal civil rights laws do not explicitly protect students from discrimination, bullying, or harassment on the basis of sexual orientation. Nonetheless, existing federal civil rights protections may apply if the discriminatory practices can be linked to a related protected class such as sex discrimination. For example, in 2010, the U.S. Department of Education Office for Civil Rights issued a Dear Colleague Letter on Title IX, a federal law that prohibits discrimination on the basis of sex. According to this guidance, “When students are subjected to harassment on the basis of their LGBT status, they may also ... be subjected to forms of sex discrimination prohibited under Title IX.”³ As a result, depending on the circumstances, Title IX’s prohibition of sex-based harassment may serve

as an imperfect substitute for an explicit protection from harassment based on sexual orientation.

Filling the gaps left in federal law, states have passed legislation to explicitly protect LGBT students from bullying, harassment, and discrimination. Eighteen states prohibit bullying based on sexual orientation and gender identity. A state may provide additional protections to LGBT students in the form of antidiscrimination statutes. Thirteen states and the District of Columbia prohibit discrimination on the basis of both sexual orientation and gender identity.⁴ Beyond state and federal law, school districts may provide greater protection through their own nondiscrimination policies. Policies that explicitly provide protections to LGBT students and employees help to create a culture that celebrates diversity. However, even with sound policies, conflicts among students emerge, particularly in the

context of speech and expression.

Freedom of Speech

Because schools seek to foster intellectual growth and critical thinking, it is not surprising that students push the boundaries of freedom of speech and expression in the educational context. From the landmark case *Tinker v. Des Moines*, we know that students have a right to freedom of speech as long as the speech does not “materially and substantially interfer[e] with the requirements of appropriate discipline in the operation of the school’ and without colliding with the rights of others.”⁵ Students have relied upon this standard to assert their right to wear T-shirts with both affirming and anti-gay messages. For example, one Illinois student wore a shirt that read “Be happy not gay.”⁶ The Seventh Circuit Court of Appeals determined that the student’s speech was protected because the T-shirt did not create a substantial disruption. On the other hand, a California student wore a T-shirt that read “Homosexuality is shameful. Romans 1:27” on the front, and “Be ashamed. Our school has embraced what God has condemned” on the back.⁷ The Ninth Circuit Court of Appeals found that the speech was not protected because the message infringed upon LGBT students’ rights to be let alone. These inconsistent outcomes illustrate the uncertainty in LGBT case law related to student expression.



Jack Plunkett/AP Images for Human Rights Campaign

Human Rights Campaign president Chad Griffin, Jim Obergefell, Mark Phariss and Vic Holmes, from left, cheer in support of the Supreme Court marriage equality ruling during a press conference on June 29, 2015 in Austin, Texas. Obergefell is the named plaintiff in the historic same-sex marriage case.

Another way students seek to express their identity, affiliation, or viewpoint is through membership in student organizations. Gay-straight alliances serve as a safe place for LGBT students to feel welcome and supported. Under the Equal Access Act and the First Amendment, school districts must treat all non-curricular student groups in the same manner.⁸ Therefore, once a school district permits one non-curricular student group, a chess club or a religious club, for example, the district cannot deny a student's request to start a gay-straight alliance. In other words, a school district cannot deny LGBT students access to opportunities that are available to other students.

Access Issues and Transgender Students

Transgender students who have been denied access to school facilities have

recently begun to initiate legal challenges. For example, in a recent case a transgender student in Virginia alleged that school officials violated both Title IX and the Equal Protection Clause when they prohibited him from using the restroom that aligned with his gender identity. Under the Obama administration, the U.S. Department of Education ("the Department") observed that Title IX's implementing regulations clearly permit restrooms and locker rooms to be segregated by sex, but at the same time found that the regulations *do not* address how school officials should determine whether a transgender individual is male or female for the purposes of facility access.⁹ The Fourth Circuit held that the Department's own interpretation of its regulation should be given appropriate deference. The Department had suggested that schools must generally treat transgender students consistent with

their gender identity. After a few other proceedings, the U.S. Supreme Court had subsequently agreed to hear this case, but later vacated the decision and sent it back to the district court because the Trump administration rescinded the Department's guidance (under the Obama administration) on the topic.¹⁰ Many anticipate that the case will return to the Supreme Court within the next few years.

The Seventh Circuit Court of Appeals recently weighed in on the issue as well when the court granted a transgender student's motion for injunctive relief. The student challenged a school policy that would not allow him to use the restroom that aligned with his gender identity.¹¹ Likewise, a transgender student's motion for a preliminary injunction was granted by a federal district court in Ohio because she was likely to succeed on her Title IX and equal protection

claims related to restroom access.¹²

Similar controversies have involved state anti-discrimination laws. Currently, at least 18 states and the District of Columbia prohibit discrimination against transgender people.¹³ In an illustrative case, the parents of a transgender student in Maine filed a lawsuit when the school district changed its policy and no longer permitted their child to use the restroom that aligned with her gender identity. The fifth grade student, who was assigned male at birth, but began to identify as a female, argued that Maine's Human Rights Act bars discrimination based on sex or sexual orientation. The school district was successful at the state trial court because of a state law requiring separate restrooms for girls and boys in public schools. On appeal, however, the state's high court found that the school district had violated Maine's Human Rights Act and ruled that transgender people are entitled to use the restrooms appropriate to their gender identity instead of their biological sex.¹⁴ The student's family was awarded \$75,000.¹⁵

Similar issues have arisen in Colorado where a first grade student who was assigned male at birth, but began to identify as female, was not permitted to use the restroom that aligned with her gender identity.¹⁶ A complaint was filed with the Colorado Civil Rights Division on behalf of the student, and she was eventually permitted to use the appropriate restroom. Other complaints have been filed with the U.S. Justice Department and the Department of Education's Office for Civil Rights in California.¹⁷

Although transgender students have had some success in recent proceedings, the law still remains unsettled. These same concerns are apparent in the context of employment, especially since many of the same laws and legal frameworks apply. Even though the law remains in flux, school districts are still permitted in most states to prohibit discrimination and allow transgender students to use facilities that align with their identities.

Employment Issues

Because protections against sexual orientation or transgender identity discrimination are uneven across American jurisdictions, the extent to which an individual is protected depends, in significant part, on the location of the employment relationship.

Title VII of the Civil Rights Act of 1964 prohibits discrimination against workers based on "race, color, religion, sex, or national origin."¹⁸ Federal courts continue to confront the question of whether the prohibition of discrimination based on "sex" precludes discrimination based on sexual orientation or gender identity.

A majority of federal circuit courts have held that Title VII does not prohibit discrimination based on sexual orientation.¹⁹ However, individuals subjected to sexual orientation or gender identity discrimination have successfully asserted claims for discrimination under a "sex stereotyping" theory. This doctrine began to take shape in a 1989 case in which the Court recognized that Title VII prohibits discrimination against a worker for a refusal to act, dress, or otherwise present one's self in conformity with traditional gender stereotypes.²⁰ Thus, to the extent that discrimination based on gender identity or sexual orientation *overlaps* with sex stereotyping, employees may be able to seek protection through Title VII of the Civil Rights Act.²¹ This is so across the country.

A 2017 decision by the U.S. Court of Appeals for the Seventh Circuit (governing federal law in Illinois, Indiana, and Wisconsin) went further, finding specifically that sexual orientation discrimination *is* sex stereotyping that violates Title VII.²² The court acknowledged what it called the "common-sense reality that it is actually impossible to discriminate on the basis of sexual orientation without discriminating on the basis of sex," as an employee subjected to sexual orientation discrimination would not be the target of such ire if she were the opposite sex.²³

Additionally, the court explained that sexual orientation discrimination unlaw-

fully subjects an employee to poor treatment because of the employee's *association* with another of the same-sex. An associational claim, long recognized for employees subjected to discrimination for interracial relationships, applies equally to same-sex romantic relationships, the court observed. The *en banc* majority noted that its decision was consistent with the Supreme Court's cases recognizing a constitutional right to marry for couples of the same sex and protecting individuals from state imposed sexual orientation discrimination.²⁴ The decision observed as well that the U.S. Supreme Court had steadily expanded its interpretation of Title VII, such as in a 1988 case in which the late Justice Scalia wrote for a unanimous Court that—though it might not have been intended at the time of enactment—Title VII prohibited discrimination between members of the same sex.²⁵ Given this expansion, the Equal Employment Opportunity Commission's interpretation of sexual orientation discrimination as sex discrimination, and the logical arguments described above, the Seventh Circuit saw its decision as on solid ground.²⁶ It remains to be seen whether other circuits will adopt the Seventh Circuit's reasoning.

Similarly, there is a split among the federal appellate courts as to Title VII's protection based on transgender identity. Some circuits have found discrimination based on transgender identity to be unlawful discrimination "because of sex" under Title VII, including the Sixth, Ninth, and Eleventh Circuit.²⁷ The Tenth Circuit appears not to recognize discrimination based on transgender identity as sex discrimination under Title VII.²⁸ Other circuits have not spoken as decisively, and as such, the status of protection extended by federal employment discrimination statutes is relatively unclear.²⁹ Notably however, in a 2002 case, the Eighth Circuit affirmed the dismissal of an employee's suit alleging that her school employer violated her right to religious accommodation by permitting a transgender female to use the women's

staff restroom in the school. There was no adverse action against the employee, the court observed, and she could show no harassment where she had access to other restroom spaces.³⁰ The courts continue to address questions of protection and access for transgender individuals.

The Constitution may protect individuals from disparate treatment as well. Because distinctions made based on sexual orientation elicit relatively weaker scrutiny under the Equal Protection Clause of the Fourteenth Amendment, plaintiffs in workplace discrimination cases alleging sexual orientation discrimination face some challenge in obtaining relief.³¹ But some cases provide potential arguments. For example, in *Diaz v. Brewer*, the Ninth Circuit (upholding a district court's injunction) prohibited the State of Arizona from revoking or denying health benefits to state employees' same-sex partners.³² When Arizona passed measures refusing recognition to same-sex marriage and then discontinuing health coverage for unmarried partners of state workers, employees whose partners were cut out of coverage objected. The Ninth Circuit agreed with the district court that the prohibition of benefits for same-sex partners ran afoul of the Equal Protection Clause.

The court observed that the state's reasons for the prohibition did not serve any legitimate government interest. The state failed to offer evidence sufficient to show significant savings. Similarly, the court rejected Arizona's argument that the prohibition would prevent fraud and would encourage marriage. Given that same-sex couples were prohibited by state law at the time from marrying, the court observed, these justifications lacked a logical connection to the means of the benefits prohibition.³³

The Supreme Court's 2015 decision on marriage may have some important implications for the employment of school professionals around the nation, as was the case in the Seventh Circuit's *Hively* decision. Because the Court determined that same-sex marriage is constitutionally protected both under the Equal Protection Clause and the Substantive Due Process Clause, same-sex couples who choose to marry (and their children) will now enjoy the panoply of rights that accompany the institution. This decision will implicate a range of rights, from non-discrimination to survivor benefits and more. Even before this influential ruling, however, many districts have found it unnecessary to wait for a constitutional answer and have already considered

enacting policies protecting employees from harassment and other forms of discrimination based on sexual orientation and gender identity.³⁴

While federal protection is uncertain in some circuits, just over half of U.S. states and many localities prohibit discrimination based on sexual orientation and gender identity in public employment.³⁵ A few additional states prohibit discrimination in employment based solely on sexual orientation but do not currently provide protections against discrimination based on gender identity.³⁶ As such, the level of protection against sexual orientation or gender identity discrimination can depend on the state and locality in which the employment relationship exists.

Action and Advocacy

Building on the current landscape of protections for LGBT students and employees, we advance the dialogue toward enacting change. In particular, we discuss several steps to support LGBT students through action and advocacy that lead to advancing human rights policies and practices.

1. *Devise Institutional Policies that Support LGBT People:* In many

Guidelines for Teachers

1. If a student reports an incident of bullying or harassment to a teacher, it should be promptly investigated and well documented. As noted, under Title IX, school officials must not be "deliberately indifferent" to known acts of harassment.
2. If a student wears an anti-LGBT T-shirt to school, school personnel should consult with the school district's attorney to learn what the law is in that particular jurisdiction. As noted above, there are conflicting case outcomes among some of the circuits on this issue.
3. Although the case law is still evolving in this area, it appears that school officials should either allow transgender students to use the restroom that aligns with the student's gender identity and/or provide unisex restroom options.
4. If an LGBT public school teacher is treated differently than other similarly situated teachers, under the Equal Protection Clause, school officials would need to have a rational reason for doing so. Also, more than 30 states and a variety of localities prohibit discrimination based on sexual orientation or gender identity in public employment, which would provide additional protections in those specific states. At least one federal court has recognized that Title VII provides protections for sexual orientation.

instances, institutional policies reflect particular social agendas that support student well-being. For example, several schools and school districts have successfully banned unhealthy foods, discriminatory mascots, and disruptive devices. They can also select vendors or participate in sponsored events of organizations that do not discriminate against LGBT employees. This approach is consistent with federal policies such as the Executive Order on LGBT Workplace Discrimination. In effect, as of April

2015, this order prohibits federal contractors and subcontractors from discriminating against employees on the basis of sexual orientation and/or gender identity. Schools and school districts should consider securing vendors and aligning themselves with sponsors that are welcoming and supportive of LGBT families, students, and employees (e.g., committed to providing benefits to their same-sex couple employees, sponsoring events to honor LGBT athletes, etc.). See the Human Rights Campaign's *Buyer's*

Guide for Workplace Equality, A Guide to Companies, Products, and Services that Support Lesbian, Gay, Bisexual, and Transgender Workplace Inclusion (downloadable at www.hrc.org/apps/buyersguide/) for company evaluations.

2. *Respond Immediately to Misleading and Deceptive Practices:* With the intent and effect of further marginalizing LGBT students, anti-LGBT groups have employed tactics involving deceit or misleading information. School leaders and

Recommended Resources

The American Civil Liberties Union (ACLU) has a dedicated site for LGBT rights. Within that site are resource pages on topics such as prom and other school dances, outing, and harassment and bullying. www.aclu.org/issues/lgbt-rights/lgbt-youth.

Congress.gov, Library of Congress provides descriptions of and tracks legislation, enabling access to LGBT-related bills through a searchable database. www.congress.gov/browse.

The Gay, Lesbian, & Straight Education Network (GLSEN) offers an array of useful resources including research reports, models of school policies and state laws to protect LGBT students, curricular materials, and webinars. In addition, GLSEN has established a system of building community advocacy with local chapters. www.glsen.org.

The Gay-Straight Alliance Network (GSA Network) leads change through student coalition building. It is a national hub for GSA student organizations. www.gsanetwork.org.

The Human Rights Campaign (HRC) lobbies for LGBT rights, providing many opportunities for advocacy. The State Equality Index assesses about 70 types of state laws and policies related to LGBT equality, including negative laws and non-discrimination. www.hrc.org/campaigns/state-equality-index. Positions taken by elected officials, the outcomes of bills introduced, and bills being lobbied for are described. www.hrc.org.

The International Gay and Lesbian Human Rights Commission (IGLHRC), a U.S.-based NGO, protects against

sexual orientation and gender identity discrimination and abuse worldwide and seeks to advance equal rights. www.iglhrc.org.

The International Lesbian and Gay Association (ILGA) is a federation of hundreds of organizations that has sponsored efforts to decriminalize homosexuality in Ireland, Russia and elsewhere. See www.ilga.org for world news and urgent actions.

Lambda Legal details specific LGBT youth rights and provides information about state laws concerning LGBT rights and protections (e.g., bullying, employment discrimination, etc.). www.lambdalegal.org/know-your-rights/youth, www.lambdalegal.org/states-regions.

The National Center for Transgender Equality seeks to advance the equality of transgender people. The document "Transgender and Gender Non-Conforming Students at School" outlines student rights, the laws that protect them, and how to deal with discrimination. <http://transequality.org/know-your-rights/schools>.

Stop Bullying is a federally sponsored program through the U.S. Department of Health & Human Services. The site serves as a guide to identify warning signs and consequences of bullying, prevention steps and responses, and policies and laws. Within the site, there are focal areas for special populations including LGBT youth. www.stopbullying.gov/at-risk/groups/lgbt/.

teachers should respond immediately to these misleading and deceptive practices. To illustrate, LGBT rights groups, parents, students, and other community members did not hesitate to express their opposition to two ads prominently displayed in several Minnesota newspapers. In late 2014, the Minnesota Child Protection League (MCPL) sought to lobby against transgender student rights on high school athletic teams. In an attempt to influence parents and the Minnesota State High School League (MSHSL), the state's athletic governing body for secondary schools, the MCPL issued an ad in September 2014 stating: "A male wants to shower beside your 14-year-old daughter. Are YOU OK with that?" Then, in November 2014, it posted another ad. It headlined: "The End of Girls' Sports? Her dreams of a scholarship shattered, your 14-year-old daughter just lost her position on an all-girl team to a man ... and now she may have to shower with him." The objections to the ads led to editorials, picketing, petitioning, protesting via social media, campaigning, and community meetings to dispel the misleading information. A few days after the last ad, 18 of the 20 MSHSL board members passed a policy allowing transgender female students to participate in Minnesota high school athletics.³⁷ However, the rule does exclude Minnesota religious-affiliated private schools.

3. *Offer an LGBT Inclusive Curriculum, Educational Programming and Information for the Community about Relevant Research:* Many students, school leaders, teachers, staff, and parents re-evaluate their viewpoints and actions in response to the acquisition of new knowledge and exposure to the latest research. Strong educational programs frame messages of community inclusion around the need to reduce expressions of hate, create safe spaces, offer ally support, and provide respect and safety. In addition, these programs serve as an opportunity to engage members of the LGBT community in discus-

sions about topics such as bullying, suicide ideation, and healthy relationships. Finally, they open dialogue about school climate and safety, identify potential allies, and combat claims of ignorance. The Gay, Straight and Lesbian Education Network (GLSEN) and other organizations provide research-based reports to support such dialogue and subsequent decision-making. These organizations

also provide resources related to creating an LGBT inclusive curriculum.

4. *Lobby for Stronger Legislation:* Unfortunately, most laws and government policies are inadequate to support LGBT students, so school leaders, teachers, staff, and parents who are knowledgeable about student needs and school practices should lobby for

INTERACTIVE CONSTITUTION



Join the 10 million teachers, students & citizens, who've expanded their civic knowledge with the National Constitution Center's *Interactive Constitution*.

A **FREE**, online tool, the *Interactive Constitution* finds common ground through differing constitutional perspectives.

Visit constitutioncenter.org/interactive-constitution.

VISIT ★ LEARN ★ DEBATE

NATIONAL CONSTITUTION CENTER



constitutioncenter.org

The Interactive Constitution was made possible by a grant from the John Templeton Foundation and under the advisement of the American Constitution Society and The Federalist Society.






change. Currently, state bullying and non-discrimination laws may be difficult to apply or simply do not apply to cases of gender identity or non-conformity. Further, these laws rarely provide adequate protections for allies. While regulations under Title IX offer a federal route for discriminatory acts based on gender identity and nonconformity, progress is still needed.

Examples of proposed legislation have included: The Real Education for Healthy Youth Act, to fund LGBT-inclusive sexual health education programs; the Student Non-Discrimination Act, to prohibit public schools from discriminating against students on the basis of their actual or perceived sexual orientation or gender identity or that of those with whom they associate; the Safe Schools Improvement Act, to require school districts receiving funds from the Elementary and Secondary Education Act (ESEA) to prohibit bullying and harassment, based upon sexual orientation and gender identity; and the Employment Non-Discrimination Act (ENDA), to protect LGBT employees from job discrimination, thus supporting LGBT families and school employees. A more comprehensive federal non-discrimination bill, The Equality Act, to amend existing civil rights law, was also introduced in July of 2015. It has been called both “a visionary piece of legislation—and way overdue.”³⁸ A poll conducted for the Human Rights Campaign determined that about 70% of likely voters would support such a law.³⁹

Conclusion

The recent U.S. Supreme Court ruling for marriage equality demonstrates the tremendous power of civic action to expand civil rights. Law-related education for teachers and students provides a solid foundation for non-partisan advocacy. Resources are provided here to answer common questions teachers have about LGBT rights, and to encourage educators to become involved in advocacy for their LGBT students, colleagues, friends,

and neighbors. 🌈

Notes

1. *Obergefell v. Hodges*, 135 S. Ct. 1039 (2015).
2. U.S. Const. amend. XIV, §1 (2014).
3. Office for Civil Rights, “Dear Colleague Letter,” U.S. Department of Education (Oct. 26, 2010), www2.ed.gov/about/offices/list/ocr/letters/colleague-201010.html.
4. Gay, Lesbian and Straight Education Network, State Maps (2017), www.glsen.org/article/state-maps.
5. *Tinker v. Des Moines*, 393 U.S. 503, 513 (1969).
6. *Zamecnik v. Indian Prairie School District*, 636 F.3d 874 (7th Cir. 2011).
7. *Harper v. Poway Unified Sch. Dist.*, 445 F.3d 1166, 1171 (9th Cir. 2006).
8. *Straights & Gays for Equality v. Osseo Area Sch. Dist. No. 279*, 540 F.3d 911 (8th Cir. 2008); *Gay-Straight Alliance of Munster High Sch. v. Sch. Town of Munster*, No. 1:14-cv-00172 (N.D. Ind. 2014).
9. *G.G. v. Gloucester Cnty. Sch. Bd.*, 822 F.3d 709 (4th Cir. 2016).
10. *Gloucester Cnty. Sch. Bd. v. G.G.*, 2017 U.S. LEXIS 1626 (U.S. 2017).
11. *Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034 (7th Cir. 2017).
12. *Bd. of Educ. v. U.S. Dep’t of Educ.*, 208 F.Supp.3d 850 (S.D. Ohio 2016).
13. “Know Your Rights: Transgender People and the Law,” *ACLU* (2017), www.aclu.org/lgbt-rights/know-your-rights-transgender-people-and-law. Also, more than 200 cities have passed ordinances or other laws prohibiting gender identity discrimination.
14. *Doe v. Reg’l Sch. Unit 26*, 86 A.3d 600 (Me. 2014).
15. David Stout, “Transgender Teen Awarded \$75,000 School Restroom Lawsuit,” *Time* (Dec. 3, 2014), <http://time.com/3615599/transgender-student-restroom-lawsuit-maine/>.
16. *Mathis v. Fountain-Fort Carson Sch. Dist. 8*, No. P20130034X (June 17, 2013).
17. *Arcadia Unified School Dist., U.S. Dep’t of Educ.*, Office for Civil Rights & U.S. Dep’t of Just., Civil Rights Div. “Resolution Agreement” (July 24, 2013), www.nclrights.org/site/DocServer/Arcadia_Resolution_agreement_07.24.2013.pdf; U.S. Dep’t of Educ., “U.S. Department of Education’s Office for Civil Rights Announces Resolution of Civil Rights Investigation of California’s Downey Unified School District” (Oct. 14, 2014), www.ed.gov/news/press-releases/us-department-educations-office-civil-rights-announces-resolution-civil-rights-investigation-californias-downey-unified-school-district.
18. 42 U.S.C. §2000e-2 (2017).
19. *Hively v. Ivy Tech Comty Coll.*, 853 F.3d 339, 341–42 (7th Cir. 2017)(*en banc*)(collecting cases).
20. *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989).
21. See, e.g., *Oncale v. Sundowner Offshore Services, Inc.* 523 U.S. 75 (1998) (finding that disparate treatment imposed for employee’s failure to conform to gender stereotypes can constitute unlawful discrimination under Title VII).
22. *Hively*, 853 F.3d at 339.
23. *Id.* at 351.
24. *Id.* (citing *Obergefell v. Hodges*, 135 U.S. 2584 (2015) and *Romer v. Evans*, 517 U.S. 620 (1996)).
25. *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75 (1998).
26. *Hively*, 853 F.3d at 341–42.
27. See *id.* at 350; *Fabian v. Hospital of Central*

Connecticut, 172 F. Supp. 2d 509, 524–25 (D. Conn. 2016) (collecting cases).

28. *Fabian*, 172 F. Supp. at 525.
29. *Hively*, 853 F.3d at 342.
30. *Cruzan v. Special School District #1*, 294 F.3d 981 (8th Cir. 2002).
31. *DeSoto v. Board of Parks and Recreation*, 2014 U.S. Dist. LEXIS 165714, *43–44 (M.D. Tenn. Nov. 25, 2014).
32. 656 F.3d 1008 (9th Cir. 2012).
33. *Id.* at 1013–15.
34. Rick Dean, “USD 501 Considers adding rules against transgender discrimination,” *The Capital-Journal* (Nov. 6, 2011), <http://cjonline.com/news/2011-11-06/usd-501-considers-adding-rules-against-transgender-discrimination>.
35. *Fabian*, 172 F. Supp. At 525; “Know Your Rights: Transgender People and the Law,” *ACLU* (2017), www.aclu.org/lgbt-rights/know-your-rights-transgender-people-and-law; Taylor Elise Pack Ellis, “Comment: Why the EEOC Got it Right in *Macy v. Holder*: The Argument in Favor of Transgender Inclusion in Title VII Interpretation,” *Scholar* 16, no. 2 (2013): 375–416.
36. *Id.*
37. Marissa Payne, “Minnesota Approves New Transgender-Friendly Policy for High School Athletes,” *The Washington Post* (Dec. 4, 2014), www.washingtonpost.com/news/early-lead/wp/2014/12/04/minnesota-approves-new-transgender-friendly-policy-for-high-school-athletes
38. Louise Melling, “The Equality Act Is a Visionary Piece of Legislation—and Way Overdue,” *ACLU Blog* (July 24, 2015), www.aclu.org/blog/speak-freely/equality-act-visionary-piece-legislation-and-way-over-due.
39. Brandon Lorenz, “Historic Marriage Equality Ruling Generates Momentum for New Non-Discrimination Law,” *HRC Blog* (July 7, 2015), www.hrc.org/blog/entry/historic-marriage-equality-ruling-generates-momentum-for-new-non-discrimina.

MARIA M. LEWIS is an Assistant Professor in the Department of Education Policy Studies and an affiliate law faculty at Pennsylvania State University. Her research focuses on the intersection of law and education as it relates to equity and diversity.

ALLI FETTER-HARROT is the Elmon and Lucile Williams Chair in Law and Public Service and an Associate Professor of political science at Franklin College in Franklin, Indiana. Her research focuses on issues of equity in education and employment law.

JEFFREY C. SUN is a Professor in the Department of Educational Leadership, Evaluation, and Organizational Development at the University of Louisville. His research examines the impacts from policy instruments or other legal actions (e.g., government mandates and judicial decisions) that advance or inhibit the academic operations of college teaching, learning, and knowledge creation.

SUZANNE ECKES is a Professor in the Educational Leadership and Policy Studies Department at Indiana University. She is President-elect of the Education Law Association.